STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN DANIEL PERROU,

Defendant-Appellant.

UNPUBLISHED
January 28, 2003

No. 231402
Bay Circuit Court
LC No. 00-001004-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN KENDALL PERROU,

Defendant-Appellee.

No. 231404
Bay Circuit Court
LC No. 00-001005-FC

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Following a joint jury trial, defendants Justin Perrou and Kevin Perrou were each convicted of armed robbery, MCL 750.529, assault with intent to commit great bodily harm less than murder, MCL 750.84, first-degree home invasion, MCL 750.110a(2), and larceny in a building, MCL 750.360. Justin Perrou was sentenced to concurrent prison terms of 156 to 360 months for the robbery conviction, 54 to 120 months for the assault conviction, 90 to 240 months for the home invasion conviction, and 17 to 48 months for the larceny conviction. Kevin Perrou was sentenced to concurrent prison terms of 240 to 480 months for the robbery conviction, 66 to 120 months for the assault conviction, 138 to 240 months for the home invasion conviction, and 12 to 48 months for the larceny conviction. Defendants appeal by right. We vacate each defendant's larceny conviction, but affirm in all other respects.

I

Defendants' convictions arise from an incident in which they broke into the complainant's home and attacked the complainant, seriously injuring him. Defendants

subsequently took a stereo speaker from the home. At trial, defendant Justin Perrou asserted that he only took the speaker as collateral for a loan that the complainant allegedly owed to Kevin Perrou, who is Justin's father. Justin claimed that the complainant was inadvertently injured while he and his father were defending themselves from the complainant while trying to leave the house.

II

Both defendants argue that the trial court erred by failing to instruct the jury on the defense of claim of right, in accordance with CJI2d 7.5. Neither defendant requested an instruction on claim of right at trial. Rather, both defendants expressed approval of the instructions as given. By doing so, they affirmatively waived any instructional error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). However, because both defendants also argue that their attorney was ineffective for failing to request a claim of right instruction, we will consider the issue in that context.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

The crimes of first-degree home invasion, larceny in a building, and robbery each require proof of specific intent. MCL 750.110a(2); *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991); *People v McFarland*, 165 Mich App 779, 783; 419 NW2d 68 (1988). A defendant's good faith belief that he owns or is entitled to the property taken may negate the specific intent element. See *People v Karasek*, 63 Mich App 706, 710-711; 234 NW2d 761 (1975). "It is necessary, however, in all cases that the claim of right be a bona fide one, and not a mere cover for a felonious taking." *Id.* at 713, quoting 52A CJS, Larceny, § 26, pp 449-450.

The evidence in this case did not support a claim of right defense. There was no evidence that defendants believed, even mistakenly, that the stolen speaker was their own property, or that either defendant believed that they were legally entitled to take the speaker as collateral for a pre-existing loan. See *People v McCann*, 42 Mich App 47, 48-49; 201 NW2d 345 (1972). Therefore, neither defense counsel was deficient in failing to request a claim of right instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, defendants have failed to establish their claims of ineffective assistance of counsel.

III

Defendant Justin Perrou argues that the prosecution failed to present sufficient evidence that he intended to steal the stereo speaker or other property at the time the complainant was assaulted or when he entered the complainant's home and, therefore, the trial court erred by denying his motion for a directed verdict of acquittal with respect to the armed robbery and home invasion charges. We disagree.

A conviction for armed robbery, MCL 750.529, requires proof beyond a reasonable doubt that the defendant had the specific intent to rob or steal at the time of the assault. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Likewise, a conviction for first-degree home invasion requires proof beyond a reasonable doubt that the defendant had the intent to commit a felony or a larceny in the home at the time of the breaking and entering. MCL 750.110a(2); *People v Uhl*, 169 Mich App 217, 221; 425 NW2d 519 (1988). The intent to commit a larceny or a felony cannot be presumed solely from proof of the breaking and entering. *Id.* at 220. However, the intent may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *Id*. Minimal circumstantial evidence of a defendant's intent is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984); see, also, *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997).

In this case, the complainant denied owing a debt to Kevin Perrou. He testified that the two defendants entered his house through the back door and immediately attacked him when he went to investigate. According to the complainant, neither defendant provided him with an opportunity to ask for an explanation of their uninvited presence. Once the complainant was subdued from the attack, defendants left with his property. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intended to take the complainant's property at the time he entered the complainant's house and assaulted the complainant. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The trial court did not err in denying defendant Justin Perrou's motion for a directed verdict.

IV

Both defendants argue that their dual convictions for armed robbery and larceny in a building violate the double jeopardy protections. Defendants failed to preserve this double jeopardy issue by raising it in the trial court. Therefore, we review the issue for plain error affecting defendants' substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

In this case, defendants' argument implicates the double jeopardy protection against multiple punishments for the "same offense." *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998). Thus, we must determine whether armed robbery and larceny in a building, arising from the same criminal transaction, constitute the "same offense" for double jeopardy purposes. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997).

Our Supreme Court has rejected the factual double jeopardy test defendants urge us to apply *People v Hurst*, 205 Mich App 634, 637; 517 NW2d 858 (1994). Rather, the test is whether the Legislature intended to permit multiple punishments. *Denio, supra*. Under the Michigan Constitution, the Legislature's intent is determined by the traditional means of examining the subject, language, and history of the statutes. *Id.* at 708. Where two statutes prohibit violations of the same social norm, albeit in a somewhat different manner, it can usually be concluded that the Legislature did not intend multiple punishments. *Id*. Similarly, "[w]here one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes." *Id*., quoting *People v Robideau*, 419 Mich 458, 487-488; 355 NW2d 592 (1984).

The social norms protected by armed robbery are primarily the protection of persons and secondarily the protection of property. *People v Hendricks*, 446 Mich 435, 449-450; 521 NW2d 546 (1994); *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983). The crime of larceny when the stolen property has a value of less than $200 is a misdemeanor that is punishable by no more than ninety-three days in jail while the crime of larceny of $200 or more but less than $1,000 is a misdemeanor that is punishable by no more than one year in jail. MCL 750.356(4) and (5). It is only when the stolen property has a value of $1,000 or more that larceny becomes a felony and is punishable by up to five years if the value of the property is between $1,000 and $20,000 and up to ten years if the value of the stolen property is $20,000 or more. MCL 756.356(2) and (3). Larceny in a building is a felony that is punishable by imprisonment of up to four years. MCL 750.360 and MCL 750.503. Larceny from a person is a felony that is punishable by imprisonment of up to ten years. MCL 750.357. Armed robbery is a felony that is punishable by imprisonment for life or any term of years. MCL 750.529. Armed robbery has been described as a larceny from a person with the additional element of violence or intimidation. *People v Beach*, 429 Mich 450, 484, n 17; 418 NW2d 861 (1988). Larceny from a person is a necessarily included lesser offense of armed robbery, while larceny from a building is a cognate lesser offense of armed robbery. *Id*. Therefore, it appears that the Legislature has taken conduct from the base statute of larceny and decided that instead of imposing dual convictions, it would add punishment for the crime of larceny from a person with the aggravating conduct of violence and intimidation. *Denio, supra*. We thus conclude that defendants' dual convictions for armed robbery and larceny in a building violate the double jeopardy protection of the Michigan Constitution. Accordingly, we vacate each defendant's conviction for larceny from a building. *People v Herron*, 464 Mich 593, 598; 628 NW2d 528 (2001); *People v Harding*, 443 Mich 693, 714, 735; 506 NW2d 482 (1993).

V

Defendant Kevin Perrou argues that the trial court erred when it denied his motion to sever his trial from codefendant Justin Perrou's trial. We disagree.

We review a trial court's ruling on a motion for a separate trial for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994); *People v Etheridge*, 196 Mich App 43, 53; 492 NW2d 490 (1992). "There is a strong policy favoring joint trials in the interest of justice, judicial economy, and administration, and a defendant does not have an absolute right to a separate trial." *Etheridge, supra* at 52. In keeping with this policy consideration, severance is required only where a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana, supra* at 346; MCR 6.121(C). In order to make this showing, a defendant must show that the defenses are mutually exclusive or irreconcilable that it "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346, 349. Incidental spillover prejudice, which is almost inevitable in a trial with multiple defendants, is not enough. Instead, "[t]he 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id*. at 349, quoting *US v Yefsky*, 994 F2d 885, 896-897 (CA 1, 1993).

Here, both defendants raised intoxication, lack of specific intent, and self-defense as part of their respective defense strategies. During both his pretrial questioning by the police and his

later testimony at trial, Justin made a number of statements that actually tended to exculpate Kevin Perrou. Justin maintained that Kevin did not want to reenter the complainant's home, did not want to take the speakers, and did not want to assault the complainant. Defendants' defenses were not "mutually exclusive" or "irreconcilable." Thus, we hold that the trial court did not abuse its discretion by refusing to sever Kevin Perrou's trial from that of Justin Perrou.

VI

Finally, Justin Perrou argues that he is entitled to resentencing because the trial court erred in scoring the sentencing guidelines. We will uphold the trial court's scoring decisions if there is evidence to support the particular score. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

First, both the circumstances of the assault and the extent of the complainant's severe injuries provide support for the trial court's decision that the crimes were "excessively brutal." Therefore, the trial court did not err in scoring offense variable (OV) seven at fifty points. MCL 777.37.

Second, considering Justin's admissions that his desire to obtain the stereo speakers caused him to return to the complainant's house, that Kevin Perrou did not want to take the speakers but did so only at Justin's insistence, and that Justin devised the plan to distract the complainant, the trial court did not err in scoring OV fourteen at ten points. MCL 777.44. Therefore, Justin Perrou is not entitled to resentencing.

We vacate each defendant's larceny conviction, but affirm in all other respects.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey